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NOTES

THE EFFECT OF THE 1910 AMENDMENT OF THE INTERSTATE COMMERCE ACT ON THE LIABILITY OF TELEGRAPH COMPANIES.—The state courts of this country early recognized the telegraph company as a public service corporation. As a consequence of this, when the telegraph companies sought to limit their liability for errors arising from the negligence of their operators, by printing on the back of their blanks a series of rules which were to govern the contract between them and their patrons, a large number of the courts were quick to declare some of these stipulations void as against public policy. One of these conditions which the telegraph companies sought to impose on the public, and which a great majority of the state courts held to be an unfair imposition, was the restriction of their liability in the case of the unrepeatd message to the amount paid for the sending of it.

The courts of last resort in the following states have held that such a stipulation is no bar to a recovery of full damages for negligence by the company in the handling of an unrepeatable message: Alabama,¹ Arkansas,² Florida,³ Idaho,⁴ Illinois,⁵ Indiana,⁶ Kentucky,⁷ Maine,⁸ Mississippi,⁹ Missouri,¹⁰ Nebraska,¹¹ North Carolina,¹² Oklahoma,¹³ South Carolina,¹⁴ Texas,¹⁵ Utah,¹⁶ West Virginia,¹⁷ and Wisconsin.¹⁸ Among the arguments advanced to support these decisions are: that the telegraph company owes a duty to supply adequate facilities to the public at a reasonable rate, and that it is unconscionable to compel the public to pay an additional charge to insure itself against the negligence of the company; that the burden of proof should rest on the company to produce facts to excuse its mistake rather than on the individual to show negligence on the part of the company, since the facts involved are peculiarly within the knowledge of the company; and that, since the transaction of modern business makes the use of the telegraph essential to the individual, his acceptance of such a condition by making use of the company's blank is in effect moral duress.

On the other hand, the "unrepeatable message" stipulation has been consistently held to be reasonable by the federal courts. The leading case on this point in the United States Supreme Court is *Primrose v. Western Union Telegraph Co.*¹⁹ The court here concludes that such a stipulation was not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. A few of the state courts have followed the federal view and have allowed this conditional limiting of liability, except in cases of gross negligence or wilful misconduct on the part of the company.

¹ *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. 332 (1899).

² *Western Union Tel. Co. v. Alford*, 110 Ark. 379, 161 S. W. 1027 (1913).

³ *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 43 So. 495 (1907).

⁴ *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 108 Pac. 910 (1910).

⁵ *Western Union Tel. Co. v. Tyler*, 74 Ill. 168 (1874).

⁶ *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701, 53 N. E. 194 (1899).

⁷ *Western Union Tel. Co. v. Eubank*, 150 Ky. 591 (1912).

⁸ *Haskell v. Postal Tel. Co.*, 114 Me. 277 (1915).

⁹ *Postal Tel. Co. v. Wells*, 82 Miss. 733, 35 So. 190 (1903).

¹⁰ *Reed v. Western Union Tel. Co.*, 135 Mo. 661 (1896).

¹¹ *Am. Express Co. v. Postal Tel. Co.*, 97 Neb. 701, 151 N. W. 240 (1915).

¹² *Williamson v. Postal Tel. Co.*, 151 N. C. 223, 65 S. E. 974 (1909).

¹³ *Blackwell Milling Co. v. Western Union Tel. Co.*, 17 Okl. 376 (1907).

¹⁴ *Walker v. Western Union Tel. Co.*, 75 S. C. 512 (1906).

¹⁵ *Postal Tel. Co. v. Sunset Construction Co.*, 102 Tex. 148, 114 S. W. 98 (1908).

¹⁶ *Brooks v. Western Union Tel. Co.*, 26 Utah 147 (1903).

¹⁷ *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410 (1903).

¹⁸ *Fox v. Postal Tel. Co.*, 138 Wis. 648 (1909).

¹⁹ 154 U. S. 1 (1893).

This view has also obtained in California,²⁰ Georgia,²¹ Massachusetts,²² Michigan,²³ New York,²⁴ and Rhode Island.²⁵

Such was the state of the law when the Interstate Commerce Act²⁶ was amended in 1910,²⁷ so as to extend the power of rate regulation in respect to interstate business to include telegraph, telephone, and cable companies in addition to railroads, already granted in the original act. Section 1 of the amended act provided *inter alia* that "messages by telegraph, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." But the amendment failed to make any mention of the liability of these companies for negligence in respect to their interstate business.

The question immediately arose in the courts of those states which had advocated unrestricted liability in the sending of unrepeatd messages, whether, in the case of interstate messages, they should continue to apply their own law, or whether, by the passage of the amended act, Congress had "occupied the field"²⁸ as to the companies' liability on interstate messages so that they were bound to apply the federal law on the subject as laid down in the Primrose case.²⁹ The question resolved itself into whether the classification provided for in Section 1, by specifically including repeated and unrepeatd messages and "such other classes as are *just and reasonable*" and thus recognizing that the telegraph companies' conditions as to unrepeatd messages were reasonable, did not impliedly put the determination of the reasonableness of these rules beyond the power of the state courts. On the other hand, it was argued that a previous amendment³⁰ had been deemed necessary by Congress to take over the field of liability of interstate carriers of goods, whereas the rate regulation of such carriers had been taken over in the original act; and therefore, by analogy, Congress had not intended to vest the Interstate Commerce Commission with exclusive powers as to liability in respect to interstate telegraph messages.

In a recent Illinois case,³¹ decided on October 27, 1919, the supreme court of that state took the view that the Amendment of 1910 did not occupy the field of liability in such cases so as to

²⁰ Coit v. Western Union Tel. Co., 130 Cal. 657 (1900).

²¹ Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017 (1901).

²² Wheelock v. Postal Tel. Co., 197 Mass. 119, 83 N. E. 313 (1908).

²³ Jacob v. Western Union Tel. Co., 135 Mich. 600 (1904).

²⁴ Weld v. Postal Tel. Co., 199 N. Y. 88 (1910).

²⁵ M. M. Stone and Co. v. Postal Tel. Co., (1910) 76 Atl. (R. I.) 762.

²⁶ Act Feb. 4, 1887, c. 104, 24 Stat. 379.

²⁷ Act June 18, 1910, 36 Stat. 539, c. 309.

²⁸ N. Y. C. R. R. v. Board of Freeholders, 227 U. S. 248 (1913).

²⁹ 154 U. S. 1 (1893).

³⁰ Act June 29, 1906, c. 3591, 7, 34 Stat. 595, U. S. Comp. Stat. 8604a.

³¹ Bowman & Bull Co. v. Postal Tel. Co., 124 N. E. 851 (Ill. 1919).

preclude the states from applying their own law to the subject. The court, citing *Pennsylvania Railroad Co. v. Hughes*,³² pointed out that the highest court of a state may administer the common law according to its understanding and interpretation without being subject to review in the federal Supreme Court, unless some right, title, immunity, or privilege, created by the federal power, has been asserted and denied; and that, by the holding in the Hughes case, state courts continued to be allowed to apply their own interpretation of the common law as to the liability of carriers, in the interim between the original rate-regulating act and the passage of the amendment (Carmack Amendment of 1906), which specifically provided for federal determination of such carriers' liability. Although since the amendment this decision is inapplicable to carriers, said the court in advancing the argument set down in the latter part of the previous paragraph, it is entirely in point in the case of telegraph companies. Also, reasoned the court, the distinction between repeated and unrepeated messages was one made by the companies prior to the amendment of 1910, even in those states where there was unlimited liability on both classes of messages; and, hence, if Congress had intended to transfer jurisdiction over the liability of the companies to federal tribunals, it would have done so in clear and unmistakable language, instead of depending on a mere classification of the various forms of messages to imply this intention.

Applying much the same reasoning, the appellate courts of three other states, Arkansas,³³ Mississippi,³⁴ and Texas,³⁵ have decided in accord with the view taken in the Illinois case. Curiously enough, in order to reach this conclusion, the supreme courts of both Arkansas and Mississippi had to overrule their own decisions of but a year or two previous, and frankly admit that they had misinterpreted the act of Congress.³⁶

But the majority of adjudicated cases in both the state and lower federal courts have held to the contrary. Such are decisions in Alabama,³⁷ Georgia,³⁸ Kansas,³⁹ Kentucky,⁴⁰ Maine,⁴¹ Massachusetts,⁴² Oklahoma,⁴³ Pennsylvania,⁴⁴ South Carolina,⁴⁵ Ten-

³² *P. R. R. Co. v. Hughes*, 191 U. S. 477 (1903).

³³ *Des Arc Oil Co. v. Western Union Tel. Co.*, 201 S. W. 273 (Ark. 1918).

³⁴ *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, 74 So. 779 (1917).

³⁵ *Bailey v. Western Union Tel. Co.*, 108 Tex. 427, 196 S. W. 516 (1917).

³⁶ *Western Union Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552 (1915); *Western Union Tel. Co. v. Showers*, 112 Miss. 411 (1916).

³⁷ *Western Union Tel. Co. v. Hawkins*, 14 Ala. App. 295 (1915).

³⁸ *Western Union Tel. Co. v. Petteway*, 21 Ga. App. 725, 94 S. E. 1032 (1918).

³⁹ *Kirsch v. Postal Tel. Co.*, 100 Kan. 250, 164 Pac. 267 (1917).

⁴⁰ *Merriweather v. Western Union Tel. Co.*, 183 Ky. 710, 210 S. W. 190 (1919).

⁴¹ *Haskell Implement Co. v. Postal Tel. Co.*, 114 Me. 277 (1915).

⁴² *Western Union Tel. Co. v. Foster*, 224 Mass. 365 (1916).

⁴³ *Western Union Tel. Co. v. Bank of Spencer*, 53 Okl. 398, 156 Pac. 1175 (1916).

⁴⁴ *Straus Gas Iron Co. v. Western Union Tel. Co.*, 59 Pa. Super. Ct. 122 (1915).

⁴⁵ *Hartness v. Western Union Tel. Co.*, 99 S. E. 759 (S. C. 1919).

nessee,⁴⁶ Virginia,⁴⁷ Wisconsin,⁴⁸ and also in the Court of Appeals for the District of Columbia,⁴⁹ the Interstate Commerce Commission,⁵⁰ and the Circuit Court of Appeals of the Eighth Circuit.⁵¹

The matter is, however, settled once and for all by a decision just handed down (December 8, 1919) by the Supreme Court of the United States in the case of *Postal-Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*⁵² In this case the Supreme Court, in interpreting the Amendment of 1910, held, in accord with the majority of the state courts, that the act did vest with the federal courts the exclusive power to determine a telegraph company's liability on unrepeatd interstate messages; and, furthermore, applying the federal interpretation of the common law, as laid down in the Primrose case, as to the company's right to restrict its liability in such messages, it reversed the decision of the Supreme Court of Mississippi in favor of the Lumber Company. Mr. Chief Justice White, in writing the opinion of the court, based his construction of the Amendment on three grounds. The first reason advanced by the chief justice is, that it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce; it is clear that the Act of 1910 was intended to and did subject telegraph companies in respect to their interstate business to a rule of uniformity of rates which it was the purpose of the Act to Regulate Commerce to establish. This purpose would be destroyed if the companies continued to remain subject to conflicting local laws. Secondly, since the Act empowered telegraph companies to fix reasonable interstate rates, it empowered them to fix a rate for the unrepeatd telegram; and, citing the Primrose case, this power carried with it the right to fix a reasonable limitation of responsibility. In his third reason, Chief Justice White points to the express classification in Section 1 of the Act, and adds: "From the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeatd message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest." The argument of the chief justice would seem to be that, because of the length of time of the existence of the unrepeatd message, Congress must be held to have understood that the express granting of the power to contract for such messages carried with it, by implication, the power to limit liability in respect to them.

Irrespective of the merits of the question as to whether or not it is good public policy to allow a public servant like the tele-

⁴⁶ *Western Union Tel. Co. v. Schade*, 137 Tenn. 214 (1916).

⁴⁷ *Boyce v. Western Union Tel. Co.*, 119 Va. 14, 89 S. E. 106 (1916).

⁴⁸ *Durre v. Western Tel. Co.*, 165 Wis. 190 (1917).

⁴⁹ *Western Union Tel. Co. v. Dant*, 42 App. D. C. 398 (1914).

⁵⁰ *Produce Co. v. Western Union Tel. Co.*, 44 Int. Com. Rep. 670 (1917).

⁵¹ *Gardiner v. Western Union Tel. Co.*, 231 Fed. 405 (1916).

⁵² —U. S.—(1919).

graph company to limit its liability in this manner, it is apparent that the Supreme Court's decision in this important case settles a troublesome question in a manner which conduces to harmony and which will prevent a considerable amount of uncertain litigation on this subject in the future.

C. W. B. T.

UPON WHOM SHOULD THE BURDEN FALL TO ESTABLISH THE VALIDITY OF AN ALTERATION IN AN INSTRUMENT?—The overwhelming weight of authority supports the view that a certificate of deposit in the ordinary form is negotiable and is, both in substance and legal effect, a promissory note, and to be governed by the rules that apply thereto.¹ In *Forrest v. Safety Banking Trust Co.*,² a certificate of deposit in the regular bank form was held to be a negotiable instrument within the provisions of the Pennsylvania Negotiable Instruments Law of 1901. In such a negotiable instrument a material alteration by the payee or transferee is a good defense, except as against a holder in due course.³ And it cannot be questioned that an alteration which changes the amount of the note or other written instrument, is a material one, both at common law⁴ and under the Negotiable Instruments Law.⁵ But it surely would seem that if such a material alteration is apparent on the face of the document, one who takes such an instrument cannot be considered a holder in due course under that section of the Negotiable Instruments Law which provides that, "A holder in due course is a holder who has taken an instrument which is complete and regular on its face."⁶ This view is strongly emphasized in three recent cases⁷ in which the preceding section of the N. I. L. was cited and it was held that one who took an instrument with an alteration plainly apparent on its face, could not be considered the taker of an instrument which was complete and regular on its face. In another case the same section was cited but was not made the basis of a similar result.⁸

¹ *Miller v. Austen*, 54 U. S. 218 (1851); *First National Bank v. Stapf*, 165 Ind. 162, 74 N. E. 987 (1905); *Hanna v. Manufacturers Trust Co.*, 104 App. Div. N. Y. 90, 93 N. Y. S. 304 (1905); *Lamar Drug Co. v. National Bank of Albany*, 127 Ga. 448, 56 S. E. 486 (1906); *Kavanaugh v. Bank of America*, 239 Ill. 404, 88 N. E. 171 (1909); *Kushner v. Abbott*, 156 Iowa 598, 137 N. W. 913 (1912).

² 174 Fed. 345 (1909).

³ Sec. 124b. "But where an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

⁴ *Cape Ann National Bank v. Burns*, 129 Mass. 596 (1880); *Fordyce v. Kosmininski*, 49 Ark. 40 (1886); *Burrows v. Klink*, 70 Md. 451, 17 Atl. 378 (1889); *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375 (1902).

⁵ Sec. 125. What constitutes a material alteration? "Any alteration which . . . changes the sum payable either for principal or interest."

⁶ Sec. 52. (1).

⁷ *Elias v. Whitney*, 50 Misc. N. Y. 326, 98 N. Y. S. 667 (1906); *Pensacola Bank v. Melton*, 210 Fed. 57 (1913); *Farmers State Bank v. West*, 77 Ore. 602, 152 Pac. 238 (1915).

⁸ *Harrison v. Pearcey*, 174 Ky. 485, 192 S. W. 513 (1917).